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IN THE

Supreme Court of the United States

GUY MITCHELL, ET AL.,

Petitioners,

v.

MARY L. HELMS, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Knights of Columbus submits this brief *amicus curiae* in support of the petitioners.[1] All parties to these cases have given their written consent to the participation of the Knights of Columbus, and copies of their written consent have been lodged with the Clerk pursuant to Rule 37.3(a) of the Supreme Court Rules.

The Knights of Columbus is a charitable Catholic family fraternal organization of over 1.6 million members and their families, totaling nearly 6 million people. Founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney, the Knights of Columbus has grown into an international organization with nearly 12,000 local councils located in all 50 states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands, Canada, Mexico, the Philippines and several other countries. The Knights of Columbus is Catholic Church's largest lay organization.

Since its founding, the Knights of Columbus has been dedicated to several purposes, including (1) rendering aid and assistance to its sick, needy and disabled members and their families; (ii) promoting social and intellectual discourse among its members and their families; (iii) promoting and conducting educational, charitable, religious, social welfare, war relief and public relief work; and (iv) maintaining a life insurance program for the benefit of its members, their beneficiaries and their families. Last year alone, the Knights contributed more than $110 million to charitable causes and provided roughly 55 million hours of volunteer service.

In addition, the Knights of Columbus has a long history of advocacy in this Court on issues of importance to the

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[1] Counsel for *amicus curiae* Knights of Columbus wrote this entire brief. No person or entity other than *amicus* made any monetary contribution to the preparation or submission of this brief.

family and the Church, including issues involving religious liberty, church-state relations and parochial schools. For example, the Knights underwrote the litigation in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Knights of Columbus therefore has a strong interest in the Establishment Clause issues raised in this case.

SUMMARY OF ARGUMENT

As it did three terms ago in *Agostini v. Felton*, 521 U.S. 203 (1997), the Court again confronts the question whether a generally available, religiously-neutral program of wholly secular governmental benefits violates the Establishment Clause because a portion of those benefits aids children attending religious schools. The answer to that question, *amicus* submits, is that it does not. The key to that answer is this Court's repeated and insistent declaration "that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

As the Court confronts the constitutionality of Chapter 2's education-materials loan program, a number of background principles help to shape the inquiry. Religious schools may receive governmental aid when it is secular in nature and generally available, even if that aid flows ultimately to many recipients and even if it has the incidental effect of freeing religious-school resources for other uses. Under the neutrality principle, which permits equal and nondiscriminatory treatment of public and private school students alike, religiously-affiliated schools are not precluded from receiving Chapter 2 aid.

Moreover, such aid is not forbidden as an impermissible subsidy to religiously affiliated schools. This Court's

decisions, although they ban targeted spending of state money to inculcate religious doctrine, have never adopted any no-subsidies-to-religious-schools principle. The contrary is true. This Court has generally tried to adhere to the neutrality principle first laid down in *Everson v. Board of Education*, "[T]he First Amendment . . . requires the state to be a neutral in its relations with groups of religious believers and non-believers." 330 U.S. 1, 18 (1947). It follows from this principle that, when students attending religious schools receive state benefits as part of a generally available program of secular assistance, the Establishment Clause is not violated. Chapter 2 aid is therefore permissible.

ARGUMENT

I. Background Principles

Long ago this Court confirmed that the Constitution protects the liberty of parents to send their children to religiously affiliated schools and the liberty of children to attend them. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Court itself has acknowledged that religious organizations, including parochial schools, perform vital secular tasks and in so doing play a valuable role in society. More than thirty years ago, the Court "recognized that religious schools pursue two goals, religious instruction and secular education." *Board of Education v. Allen*, 392 U.S. 236, 245 (1968). Indeed, "the [contribution] of church-related elementary and secondary schools in our national life . . . has been and is enormous." *Lemon v. Kurtzmann*, 403 U.S. 602, 625 (1971).[2]

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[2] "[P]rivate education has played and is playing a significant and valuable role in raising national levels of knowledge, competence and experience." *Board v. Allen*, 392 U.S. at 247. *See also Wolman v. Walter*, 433 U.S. 229, 262 (1977) (Powell, J., concurring and dissenting) ("Parochial schools, quite apart from their sectarian

In view of the substantial secular benefits that result from education (whether provided in public, religiously affiliated, or other private schools), it is no surprise that governments should attempt to advance the goals of secular education even when those objectives are served by religiously affiliated schools. When government so acts, contact between government and religious entities unavoidably follows.[3] The forms such contact takes vary in kind and intensity. This variety is an important reason why, in Justice O'Connor's words, "the Establishment Clause . . . cannot easily be reduced to a single test." *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 720 (1994) (concurring).

Notwithstanding this variety, the Court has always tried to afford students attending religiously affiliated institutions and students the same neutral, evenhanded treatment it provides their public school counterparts.[4] The neutrality

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purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools.").

[3] The Court has repeatedly emphasized that significant interaction between religion and government is inevitable. As Justice O'Connor has noted, "[i]n this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect." *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (concurring).

[4] This is true in part because the Religion Clauses provide no justification for discrimination against religion. In Justice O'Connor's words, "[t]he Establishment Clause does not demand hostility to religion, religious ideas, religious people or religious schools." *Kiryas Joel*, 512 U.S. at 717 (concurring). This truth is a direct corollary of the neutrality principle first articulated by the modern Court in *Everson*: "[T]he First Amendment . . . requires the state to be a neutral in its relations with groups of religious believers and non-believers." 330 U.S. at 18. This principle has special salience here because it is the free exercise of religion that brings children to religious schools.

principle that ensures such treatment is the subject of Part II, *infra*. And the Court has also elaborated a series of guiding principles that help to shape its inquiry in the school-aid setting. Most of these principles lack the stature and scope of the neutrality principle; like the *Lemon* test itself,[5] they are perhaps better characterized as "helpful signposts" than as principles or rules.[6] But these signposts have guided the Court in the past, and they bear directly on the Chapter 2 aid at issue here.

First, *the prohibited evil proscribed by the Establishment Clause*, and targeted by *Lemon's* primary-effect prong, *is the evil of the government itself advancing religion*. As the Court expressed it in *Corporation of Presiding Bishop v. Amos*, "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 483 U.S. 327, 337 (1987) (emphasis in original).

Second, *the Establishment Clause does not prohibit direct grants of aid to religiously affiliated educational organizations*. *Bowen v. Kendrick*, 487 U.S. 589 (1988) (allowing cash grants to religious groups for teen-sexuality instruction); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (cash grant to religiously affiliated schools for costs of state testing and attendance requirements); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (annual cash grant to private colleges to be used for nonsectarian purposes); *Tilton v. Richardson*, 403 U.S. 672 (1971) (construction grants to religious colleges for

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"[T]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 639, 641 (1978) (Brennan, J., concurring).

[5] *Lemon v. Kurtzmann*, 403 U.S. 602 (1971).

[6] *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

buildings dedicated to secular purposes); *accord Bradfield v. Roberts*, 175 U.S. 291 (1899) (religious hospital not precluded from participating in government aid program).

Third, *otherwise permissible benefits to religiously affiliated institutions are not made impermissible merely because they flow to many such recipients*. In *Mueller v. Allen*, 463 U.S. 388 (1983), 96% of the beneficiaries of the private-school tax deduction approved by the Court were parents of children who attended religious schools. The Court made clear that the number of beneficiaries was irrelevant, saying "we would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under he law."[7] *Id.* at 401. The Grand Rapids, Michigan Shared Time program at issue in *School District of Grand Rapids v. Ball*,[8] and later approved in *Agostini v. Felton*,[9] authorized aid to all eligible students in forty-one private schools and *forty of those forty-one were "pervasively sectarian."* And in *Agostini* itself, the Court took care to point out that its earlier decision in *Zobrest*—that provision of a sign-language interpreter to a religious school student was constitutionally valid—did not depend on the fact that only

[7] *See also Witters v. Washington Dept. of Servs. For Blind*, 474 U.S. 481, 491 (1986) (Powell, J., concurring) (where aid flows to religious institutions as result of parents' private choices, program does not have the primary effect of advancing religion even if over 90% of such benefits flow to a religious institution).

[8] 473 U.S. 373 (1985), *overruled in part by Agostini v. Felton*, 521 U.S. 203 (1997).

[9] The Shared Time program in *Ball* provided instruction by public school teachers on the premises or religious schools of approximately 10% of the teaching day. The program was first struck down as an impermissible advancement of religion, *id.*, and later approved, *see Agostini*, 521 U.S. at 235 ("we must acknowledge that . . . the portion of *Ball* addressing Grand Rapids' Shared Time program [is] no longer good law").

a single student was helped.[10] Indeed, in *Agostini* the Court refused "to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid." *Id.* at 229.

Fourth, *aid to the secular aspects of religious schools is not forbidden merely because such aid has the incidental effect of permitting the schools to spend their own resources for religious purposes*. The Court "'has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.'" *Regan*, 444 U.S. at (quoting *Hunt v. McNair*, 413 U.S. 734, 743 (1973)). As the Court recently stated in *Agostini*, "we have departed from the rule relied on in *Ball* that all government aid that directly aids the educational function of religious schools is invalid." 521 U.S. at 225. As will be shown below, *Agostini* thereby renounced the notion underlying this Court's previous rejection of certain educational-materials loan programs and revitalized a principle that had animated the Court's Establishment Clause jurisprudence from the beginning.

Fifth, *it is the governmental program as a whole that must be the focus of the Establishment Clause analysis*, because, in the Court's words, "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch v. Donnelly* 465 U.S. 668, 680 (1984). Generally available government programs of secular educational assistance may affect both secular and religiously affiliated entities. If the neutrality principle means anything, *see* Part II *infra*, then

[10] Referring to the Title I aid at stake in that case, the *Agostini* Court said that "[a]lthough Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant." 521 U.S. at 228.

the mere fact that religious entities derive incidental benefits from a governmental program is no cause for excluding them from it.

With these guidelines as background, we proceed to consideration of the Chapter 2 program itself in light of the Court's principal measuring stick in the school-aid setting: the neutrality principle.

II. Chapter 2 Assistance to Religious Schools Is Permissible Under the Neutrality Principle.

A. The Chapter 2 Program.

Chapter 2 provides library books, instructional materials, reference materials, and computer software to public and private school children alike. Nationally, a substantial majority of the students receiving Chapter 2 assistance attends public schools. Chapter 2 materials are provided to public schools directly and are lent to religiously affiliated schools by a public agency. Ownership of materials lent remains with that public agency. *See* 20 U.S.C. § 7372(c)(1). Chapter 2 materials must be "secular, neutral and nonideological." 20 U.S.C. § 7372(a)(1). Their objective is to supplement the regular school curriculum and by law they may not "supplant funds from non-federal sources." 20 U.S.C. § 7371(b). In the Louisiana program at issue here, Chapter 2 coordinators at Local Educational Agencies (which have responsibility for distributing and reporting on materials) are trained in the prohibitions on religious use of Chapter 2 funds and materials.[11]

[11] The Jefferson Parish program at issue here contains numerous additional safeguards against diversion of Chapter 2 funds to religious uses. *See* Petition for Writ of Certiorari of Guy Mitchell, *et al.* No. 98-1648 ("Cert. Pet."), at 7-9.

In short, the statutory purpose and intended effect of Chapter 2 is to provide supplemental educational benefits to all schoolchildren without reference to the religious or nonreligious nature of their schools.

B. The Neutrality Principle Permits Provision of Chapter 2 Aid to Religiously Affiliated Schools.

From the Court's first aid-to-religious-schools case to its decision three terms ago in *Agostini*, evenhanded treatment of public and parochial school students has been the benchmark of Establishment-Clause jurisprudence. The first great Establishment Clause case of the Court's modern era is *Everson v. Board of Education*, 330 U.S. 1 (1947). *Everson* stated the principle that has informed all the Court's subsequent thinking on school-aid issues: no persons may be excluded from publicly available benefits "because of their faith, or lack of it" and therefore the Establishment Clause does not bar a state "from extending its general state law benefits to all its citizens without regard to their religious belief." *Id.* at 16 (original emphasis deleted).

In the school aid setting, the Court has held over and over again "that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit." *Zobrest* 509 U.S. at 8 (allowing state-paid sign-language interpreter at religiously affiliated secondary school); *see also Agostini*, 521 U.S. 203 (allowing Title-I remedial-education aid to public and private school students alike on premises of school whether religiously affiliated or not); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995) (funding of religious group campus publication on equal footing with other campus groups); *Witters v. Washington Dept. of Servs. for Blind*, 474 U.S. 481, 487-

88 (1986) (tuition assistance for handicapped student for religious study "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited"); *Mueller*, 463 U.S. at 397-400 (tax deduction for school tuition used predominantly for attendance at religiously affiliated schools); *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349, 362 (1975) (textbook loan "merely makes available to all children the benefits of a general program to lend school books free of charge"); *Board of Education v. Allen*, 392 U.S. 236, 243 (1968) (textbook loan to students attending religiously affiliated schools); *Everson*, 330 U.S. at 17 (bus rides to and from school).

In a closely related series of school/education cases, the same neutrality principle has been applied to approve equal access to public school facilities for religious groups or speakers, *see Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (public school property available on equal basis to religious and nonreligious speakers); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (upholding equal access to high school facilities for religious student groups with nonreligious student groups; "provision of benefits to broad spectrum of groups is an important index of secular effect"); *Widmar v. Vincent*, 454 U.S. 263, 274-75 (1981) (access to state university facilities for student religious group on equal basis with nonreligious student groups); to approve religious groups' providing secular instruction on teen sexuality issues, *see Bowen v. Kendrick*, 487 U.S. 589 (1988) (federal grants to religious and nonreligious groups alike for premarital sex and pregnancy counseling involving "wide spectrum of organizations . . . eligible to apply for and receive funding . . . [that is] neutral with respect to the grantee's status as a sectarian or purely secular institution"); to approve religious speakers' use of a state-owned public forum, *see Capitol Square Review &*

Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (private religious speech permitted in state-owned plaza because forum is open to a broad spectrum of groups with only incidental benefits to religion); and to approve tax exemptions for religious organizations, the benefit of which in at least some cases flowed to religious schools, *see Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (church tax exemption; exemption available to a range of nonprofit groups).

Moreover, within the school-aid setting, the Court has approved targeted programs benefiting solely private (and primarily religiously affiliated) schools, when the intent was to treat public and private schools in a neutral and evenhanded fashion. *Regan*, 444 U.S. 646 (cash grants to reimburse costs of state attendance- and test-taking requirements); *Roemer* 426 U.S. 736, 746 (annual subsidy to private colleges to be used for nonsectarian purposes; "religious institutions need not be quarantined from public benefits that are neutrally available to all"); *Tilton v. Richardson*, 403 U.S. 672 (1971) (construction grants to religious colleges for buildings dedicated to secular purposes).

Collectively, the foregoing cases demonstrate that the Court's neutrality decisions are no mere subsidiary body of law. To the contrary, the neutrality principle is central to this Court's Establishment Clause jurisprudence. These cases provide overwhelming support for the fundamental principle applicable here—that the Establishment Clause permits provision of government benefits to a broad class of recipients defined without reference to religion. The Court's most recent Establishment Clause case, *Agostini v. Felton*, clearly illustrates the application of the neutrality principle to a program of secular benefits provided to a range of beneficiaries without regard to religion.

Agostini is now the point of departure for assessing the constitutionality of government programs that assist

religiously affiliated schools. Among its significant features, *Agostini* recast the third, so-called "entanglement" prong of the Court's three-part test in *Lemon v. Kurtzmann* as an element of *Lemon's* second inquiry, *i.e.*, whether the program at issue impermissibly advances religion. Thus, assuming the presence of a secular purpose, under *Agostini,* governmental aid passes muster unless it has the impermissible effect of advancing religion. Illicit advancement may exist where a program (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement of government with religion. *See Agostini,* 521 U.S. at 234. Chapter 2 does none of these.

First, like the Title I aid provided in Agostini, Chapter 2 aid is wholly secular, neutral and nonideological. Especially in view of the anti-diversion safeguards present in this case, there is no reason to believe, and indeed no record evidence, that Chapter 2 aid results in, or has resulted in, "religious indoctrination."

Second, Chapter 2 does not define its recipients by reference to religion. It does not do so *directly* because the program, on its face, provides religion-neutral assistance to children attending both public and private religiously affiliated schools alike. Nor does it "define" its recipients by religion *indirectly*. Because Chapter 2 services are the same for both public and private school students, Chapter 2 creates no incentive for any student to attend a religiously affiliated school.[12] In other words, Chapter 2 is not distinguished by "criteria [that] might themselves have the effect of advancing religion by creating a financial

[12] In this respect as well, Chapter 2 aid resembles the secular benefits offered on a religiously-neutral basis in the Title I program in *Agostini*.

incentive to undertake religious indoctrination." *Agostini*, 521 U.S. at 231.[13]

Third, Chapter 2 fosters no excessive government entanglement with religion. The program does contain numerous safeguards—many of them analogous to the reporting and monitoring provisions present in *Agostini*—to assure that state resources are not employed for the teaching of religion. These forms of administrative cooperation are "insufficient . . . to create an 'excessive' entanglement," *id.* at 233-34, and are no more troubling than mechanisms approved in *Agostini*.[14] Moreover, to the limited extent the Chapter 2 materials at issue pose any risk of diversion to religious uses, there will be opportunity enough to tailor remedies to such wrongs when and if such wrongs are ever demonstrated. The Court in *Agostini* and *Zobrest* refused to create a constitutional presumption that the religious-school environment would give rise to improprieties. *Id.* at 234. Particularly in view of the wholly secular character of the aid at issue, and the safeguards in place to ensure proper use, there is no reason to do differently here.

In short, under *Agostini's* rendering of *Lemon's* Establishment Clause test, Chapter 2 aid is unproblematic.

[13] The fact that by law Chapter 2 aid supplements rather than supplants the materials-providing function of the religious schools does not affect the "no-incentive" test of *Agostini*. Even if the library books, reference materials and computer software provided by Chapter 2 were (contrary to fact) intended to supplant materials provided by religiously affiliated schools, they would not create an incentive to attend religious schools if they were also provided to the public schools on the same (supplanting, not supplementing) basis. No illicit incentive effects are present "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis," *Id.* at 231.

[14] *See* Cert. Pet. at 5-9.

Indeed, the only argument against Chapter 2's constitutionality is, as the Fifth Circuit concluded, the notion that this Court's holdings in *Meek* and *Wolman* bar Chapter 2 assistance to religiously affiliated schools.[15] But *Agostini* flatly rejected the central principle underlying *Meek* and *Wolman*'s disapproval of state-provided educational materials: the notion "that all government aid that directly aids the educational function of religious schools is invalid." *Agostini*, 521 U.S. at 225. This Court should make explicit what *Agostini* and its other neutral-aid, school-assistance cases have established: the instructional-materials aspects of *Meek* and *Wolman* are no longer good law. Those cases should be formally overruled.

It may be added that, as with the program approved in *Agostini*, Chapter 2 aid supplements and does not supplant materials otherwise provided by the schools for their regular curriculum. To the extent this supplement-not-supplant factor remains relevant after *Agostini*, it too reinforces that the aid is unproblematic. Chapter 2 aid simply "do[es] not . . . 'reliev[e] sectarian schools of costs they otherwise would have borne in educating their students.'" *Id.* at 228 (quoting *Zobrest*, 509 U.S. at 12).[16]

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[15] *See Helms v. Picard*, 151 F.3d 347, 371-74 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 2336 (1999).

[16] Although *Zobrest* observed that the state-paid sign-language interpreter at issue did not "relieve sectarian schools of costs they otherwise would have borne" in educating students, that factor alone was not and, indeed, could not have been, of constitutional significance. *Id.* at 12. A whole host of this Court's decisions, from *Everson* forward, cannot be squared with the notion that the Establishment Clause forbids all government aid that relieves sectarian schools of costs they otherwise would have borne in educating their students. For example, "such federal governmental services as ordinary police and fire protection, connection for sewage disposal, public highways and sidewalks," *Everson*, 330 U.S. at 17-18, could not be provided if this were the law. *See* discussion and table *infra*, at 19-20.

One additional aspect of *Agostini* is worth noting—the implication of *Agostini's* approval of the Shared Time program that had originally been struck down in *School District v. Ball*.[17] *Ball's* Shared Time program included provision of secular aid in the form of remedial and enrichment mathematics and reading, as well as art, music and physical education on religious school premises. Shared Time was a targeted program, providing assistance solely to nonpublic school students. In *Ball*, it appeared from the record that "[t]he public school system . . . provide[d] all the supplies, materials, and equipment used in connection with Shared Time instruction." 473 U.S. at 376. When the Court decided *Agostini*, it "ma[d]e clear that under current law, the Shared Time program in *Ball* . . . will not, as a matter of law, be deemed to have the effect of advancing religion through religious indoctrination." 521 U.S. at 226. *Agostini* thus approved Shared Time's *targeted* assistance (to nonpublic school students *alone*) in the form of supplies, materials and equipment. In light of that holding, it would be strange indeed were the Court to conclude that instructional materials in the form of library books, instructional materials, reference materials, and computer software—provided pursuant to a general, religiously-neutral program like Chapter 2—somehow gave rise to a forbidden advancement of religion.

In sum, the teachings of *Agostini* (and this Court's other neutrality decisions) apply here. Instructional materials lent to religiously affiliated schools as part of a generally available program of secular benefits are not forbidden merely because they are provided directly to religiously affiliated schools, or because they are used on premises, or because there exists some risk of diversion, or because

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[17] 473 U.S. 373 (1985), *overruled in part by Agostini*, 521 U.S. 203.

there is monitoring to ensure compliance with non-diversion requirements.

III. Chapter 2 Aid Is Not Barred by Any "No Subsidization" Principle in This Court's Jurisprudence.

Neither the reasoning nor the results of the Court's aid-to-religious-schools cases reflect a commitment to any no-subsidy principle. Indeed, strict application of a "no-subsidy" rule would eviscerate the neutrality principle and disallow a range of governmental benefits currently provided to religious schools as part of general programs of secular assistance.

In opinions of the Court and in opinions of the Justices writing separately, government aid to religious entities or religiously affiliated schools has frequently been characterized as a "subsidy" or as "subsidization." Opinions disfavoring such assistance have sometime expressed the view that the Constitution forbids such subsidies altogether. Dissenting in the second *Lemon* case, Justice Douglas wrote that "[f]rom the days of Madison, the issue of subsidy has never been a question of the amount of the subsidy but rather a principle of no subsidy at all." *Lemon v. Kurtzmann*, 411 U.S. 192, 210 (1973) [*Lemon II*] (Douglas, J., dissenting). The dissent in *Agostini* read the Constitution as imposing a "flat ban on subsidization," which, the dissent said, "antedates the Bill of Rights and has been an unwavering rule in Establishment Clause cases."[18]

In practice, the concepts of "subsidy" and "subsidization" are notoriously elusive. Opinions in the

[18] 521 U.S. at 243 (Souter, J.) (an unwavering rule qualified only by the state exactions from college students approved in *Rosenberger v. Rector of the University of Va.*, 515 U.S. 819 (1995)).

Establishment Clause field have characterized as "subsidies" such varied practices as payment of cash to a religious organization for the express purpose of teaching religious doctrine,[19] granting a tax exemption to a religious entity as part of a program of exemptions for other nonprofit charitable undertakings,[20] and granting to public employees a holiday for major religious feasts.[21]

A. This Court's Cases Have Held that Government May Not Spend Public Funds for Religious Indoctrination.

The Court has maintained that government may not target religion directly for support, as for example in the case of a cash payment to a religious person or entity for purposes of teaching religion.[22] One of the "three primary criteria [the Court] currently use[s] to evaluate whether government aid has the effect of advancing religion" is whether the aid "result[s] in governmental indoctrination." *Agostini*, 521 U.S. at 234..[23] In Justice O'Connor's words,

[19] *Rosenberger*, 515 U.S. at 868 (Souter, J., dissenting).

[20] *Walz*, 397 U.S. at 704 (Douglas, J., dissenting).

[21] *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984).

[22] There is a well recognized "exception" to the no-funds-for indoctrination rule. The "exception" is in reality a complement to the neutrality principle itself. The government may spend money on religion, even money directly for religious worship, when it accommodates religion by acting to lift a state-imposed burden on its exercise, as, for example, when the government provides and pays the salaries of military chaplains ministering to the armed forces. *See Kiryas Joel*, 512 U.S. at 705-06; *School Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J. concurring).

[23] *See also Ball*, 473 U.S. at 385 ("the [Establishment] Clause does absolutely prohibit *government-financed or government sponsored indoctrination into the beliefs of a particular faith*" (emphasis added); *McCollum v. Board of Educ.*, 333 U.S. 203, 212 (1948) (striking down program in which "the State's tax-supported public school buildings [are] used for the *dissemination of religious doctrines*") (emphasis

"*any* use of public funds to promote religious doctrines violates the Establishment Clause." *Bowen v. Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J. concurring) (emphasis in original).

Whatever meaning(s) the term "subsidy" may have in the Court's Establishment Clause jurisprudence, this much is clear: the modern Supreme Court has never permitted the state to make direct cash payments to churches or religiously affiliated persons for the express purpose of teaching religion.

B. The Court's Establishment Clause Cases Neither Establish Nor Flow from a "No Subsidy" Principle.

1. The Programs Addressed by the Court Cannot Be Understood as Conforming to Any "No-Subsidy" Principle.

Beyond the firm ban on government sponsored indoctrination, however, the cases simply do not support the proposition that this Court has ever imposed "an unwavering rule" in the form of a "flat ban on subsidization." Indeed, the contrary principle is true. A "fixed principle in this field is [the Court's] *consistent rejection* of the argument that 'any program, which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (quoting *Hunt v. McNair*, 413 U.S. 734, 742 (1973)) (emphasis added). Although the Court moved in the direction of a no-subsidy rule in the 1970's, it has just as clearly pulled back from such a notion in the last twenty years or so.

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added); *Wolman*, 433 U.S. at 240 (fact that nonpublic school does not control content of the state-mandated test "serves to prevent the use of the test *as a part of religious teaching*") (emphasis added).

A brief overview of the forms of aid allowed by the Court demonstrates beyond cavil that, taken as a whole, the Court's school aid decisions cannot be understood in terms of any clear and consistent no-subsidy rule.[24]

Practices Approved by the Court	Practices Not Approved by the Court
Property tax exemptions[25]	Teachers' salaries[26]
Tax deductions for parents[27]	Tuition grants or reimbursements (elementary school)[28]
Scholarships usable at religious colleges[29]	
School lunches[30]	
Textbooks[31]	Non-textbook educational materials[32]
Costs of state-prepared tests[33]	Cost of teacher-prepared tests[34]

[24] This table is adopted in substantial measure (with some updating and alteration) from John Garvey, *Another Way of Looking at School Aid*, 1985 Sup. Ct. Rev. 61, 67.

[25] See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

[26] *Lemon*, 403 U.S. 602.

[27] *Mueller v. Allen*, 463 U.S. 388 (1983).

[28] *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973).

[29] *Witters v. Washington Dep't of Servs. For the* Blind, 474 U.S. 481 (1986); *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn.), *aff'd*, 434 U.S. 803 (1977); *Smith v. Bd. of Governors of University of N.C.*, 429 F. Supp. 871 (W.D.N.C.), *aff'd*, 434 U.S. 803 (1977).

[30] *Lemon*, 403 U.S. at 616.

[31] *Board of Education v. Allen*, 392 U.S. 236 (1968).

[32] *Wolman v. Walter*, 433 U.S. 229, 248-51 (1977) (lent to schools); *Meek v. Pittenger*, 421 U.S. 349 (1975) (lent to parents or students).

[33] *Wolman*, 433 U.S. at 238-41 (tests supplied by state); *Committee for Public Education v. Regan*, 444 U.S. 646 (1980) (cash grant to religious school to reimburse costs of tests).

Practices Approved by the Court	Practices Not Approved by the Court
Diagnostic services[35]	
Bus rides to school[36]	Bus rides on field trips[37]
Therapeutic services/counseling off premises[38]	
Counseling on premises;[39]	
Remedial instruction off premises[40]	
Remedial and supplemental instruction on premises[41]	
Tax-exempt financing for secular projects at religious college[42]	
Construction grants (colleges)[43]	Maintenance and repair (lower schools)[44]
Annual subsidy limited to secular purposes (colleges)[45]	
Sign language interpreter (lower schools)[46]	

[34] *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973).

[35] *Wolman*, 433 U.S. at 241-4.

[36] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[37] *Wolman*, 433 U.S. at 252-55.

[38] *Wolman*, 433 U.S. at 244-48.

[39] *Agostini*, 521 U.S. 203, *overruling in part Meek*, 421 U.S. at 367-72.

[40] *Aguilar v. Felton*, 473 U.S. 402 (1985), *overruled on other grounds by Agostini*, 521 U.S. 203.

[41] *Agostini*, 521 U.S. 203, *overruling in part Ball*, 473 U.S. 303 (1985), *and overruling Aguilar v. Felton*, 473 U.S. 402.

[42] *Hunt v. McNair*, 413 U.S. 734 (1973).

[43] *Tilton v. Richardson*, 403 U.S. 672 (1971).

[44] *Nyquist*, 413 U.S. 756.

[45] *Roemer v. Public Works Bd.*, 426 U.S. 736 (1976).

The foregoing chart demonstrates that the programs approved and disapproved by the Court cannot be differentiated according to any no-subsidy principle. Every form of assistance in the (approved) left-hand column is a "subsidy" to religiously affiliated schools in the sense that such aid directly or indirectly supports the school or facilitates attendance. Furthermore, under any fair and univocal meaning of the term "subsidy," non-textbook educational materials simply cannot be said to subsidize schools if textbooks do not. And reimbursement of costs associated with grading teacher-prepared tests no more (and no less) subsidizes a parochial school than does reimbursement of costs for state-prepared tests. In short, considering all the school-aid programs addressed by the Court, their *outcomes* cannot be explained by any no-subsidy rule.

2. The Court's Establishment Clause Cases Do Not Apply a "No-Subsidy" Principle.

Nor has the Court applied a consistent no-subsidy principle in the *reasoning* underlying its school-aid decisions. The Court's post-*Everson* cases reflect a continuing effort by the Court to assure evenhanded treatment of public and private schoolchildren alike. Although in the 1970's the Court flirted for a brief period with the notion that aid to the whole religiously affiliated school necessarily aids religion, the Court's decisions overall can be said to reject the no-subsidy principle in favor of efforts to implement the neutrality principle—while assuring that the government does not finance religious indoctrination.

[46] *Zobrest*, 509 U.S. 1.

a. The Early Period.

From the time of *Everson* in 1947 to the Court's 1971 decision in *Lemon*, the Court expressly allowed or tacitly approved a host of measures that had the effect of aiding religious schools. *Everson* permitted provision of school bus services to parochial school students. 330 U.S. 1. *Walz* upheld tax exemptions for church entities, of which a great many supported religious schools. 397 U.S. 664. *Allen* allowed the state to provide loans of secular textbooks to religiously-affiliated schools. 392 U.S. 236. *Tilton v. Richardson,* describing the Court's then-prevailing outlook as a "refus[al] to assume that religiosity in parochial elementary and secondary schools necessarily permeates the secular education that they provide," permitted construction grants to religious colleges for buildings dedicated to secular purposes notwithstanding some ultimate benefit to the religious college as a whole. 403 U.S. 672, 681 (1971). And in 1971, *Lemon v. Kurtzmann* (while striking down direct cash grants to religious schools on entanglement grounds) reaffirmed the conclusion that, in principle, if not always in practice, the secular and religious components of schooling need not be so intertwined as to make all secular school aid instrumental in the teaching of religion. 403 U.S. 602, 613 (1971).

When *Lemon* returned to the Court in 1973 after remand, the Court again *rejected* "the view that the Establishment Clause forbids any and all use of tax moneys to 'support' or to 'subsidize' sectarian schools."[47] At the same time, in *Committee for Public Education & Religious Liberty v. Nyquist*, the Court reaffirmed that "not every

[47] *Lemon II*, 411 U.S. at 206 n.7. The Court also stated that "there is...no basis for the dissent's suggestion that the Court has been 'unequivocal' in proscribing all state assistance to religious schools." *Id.*

law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." 413 U.S. 756, 771 (1973).

b. *Nyquist-Meek-Wolman*

In *Nyquist*, however, traces of a different notion—that any significant benefit to the educational function of the religious school is a subsidy necessarily having impermissible effects—began to emerge. Along with *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), *Nyquist* brought the Court closest to adopting a "no-subsidy" rule in the school-aid setting.

Nyquist struck down three forms of aid to religiously affiliated schools. The first provided a direct cash grant to nonpublic schools for the purpose of subsidizing the maintenance and repair costs of private schools. The second provided tuition reimbursement to low-income parents of religious school children. The third was an income tax deduction-credit scheme providing for reduced income tax payments by parents of (predominantly religious) private school parents. The Court found all three programs impermissible. Most significant was the Court's discussion of tuition reimbursement for low income parents.

Such payments, the Court said, created an incentive for parents to send their children to religiously-affiliated schools. 413 U.S. at 786. Students who might not otherwise attend religiously affiliated schools now could. Significantly, the Court found the program problematic not because of its direct effects on the families receiving the aid, but because of the aid's ultimate (though indirect) effect on the religiously affiliated school. Thus, said the Court, "[w]hether this grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same." *Id.* at 786. Such aid was impermissible because "[t]he effect of the aid is unmistakably to provide desired

financial support for nonpublic, sectarian institutions." *Id.* at 783.

In *Meek v. Pittenger*, this Court disallowed a direct loan of instructional materials to religiously affiliated schools. 421 U.S. 349 (1975). The materials consisted of maps, charts and laboratory equipment. Like the materials at stake in this Chapter 2 case, the materials in *Meek* were "secular, neutral and nonideological." 421 U.S. at 355 n.4. Nonetheless, the Court found that they violated the primary-effect prong of *Lemon* because the aid was "[s]ubstantial," and "[s]ubstantial aid to the educational function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole." *Id.* at 366. Loans of instructional materials had the primary effect of advancing religion because of the predominantly religious character of the schools. *Id.*

Wolman followed on the heels of *Meek*. In *Wolman* the Court invalidated the loan of instructional materials to parents under a state statute. It found no constitutional difference between provision of the materials directly to the schools or indirectly to the parents for their children's use in the schools. The difference in delivery mechanism did not alter the underlying principle, a principle *Wolman* borrowed from *Meek*, namely that such aid was impermissible "[i]n view of the impossibility of separating the secular education function from the sectarian." *Wolman*, 433 U.S. at 250. The religious school's twin functions of providing secular and religious education meant that "state aid inevitably flows in part in support of the religious role of the schools." *Id.*

The informing principle of *Nyquist*, *Meek* and *Wolman*—that substantial secular aid to religious schools was impermissible because it aided "the sectarian enterprise of the school as a whole"—is the closest this Court has ever come to adopting a "no subsidy" principle applicable to religiously affiliated schools. But even that principle does

not amount to a "no subsidy" rule. *Meek* itself allowed loans of textbooks to parochial school-children and *Wolman* permitted funding of standardized tests and allowed diagnostic services on school grounds and therapeutic services off-premises.

c. The Later Period

Although never explicitly overruled, the principle underlying *Meek* and *Wolman's* rejection of education-materials loans—that substantial aid to the educational function of a sectarian school necessarily results in aid to the sectarian enterprise as a whole—has not been followed. In fact, the Court has since retreated from that notion in a whole range of cases.

Justice Brennan's concurrence in *McDaniel v. Paty* (although primarily a Free Exercise case) was a harbinger of change. Concurring in the Court's rejection of Tennessee's clergy-disqualification statute, he abjured the no-subsidization rule in these terms: "we have rejected as unfaithful to our constitutionally protected tradition of religious liberty, any conception of the Religion Clauses as stating a 'strict no-aid' theory." 435 U.S. 618, 638 (1978). Thus, in the next school aid case to come before it, *Committee for Public Education & Religious Liberty v. Regan,*[48] the Court permitted assistance to religious schools in the form of a direct cash grant.

Indeed, *Regan* not only permitted a "subsidy" or "subsidization," it permitted such subvention *in the form of a direct cash grant to religiously affiliated schools*. *Regan* upheld a New York statute providing that private schools, including religiously affiliated schools, could be reimbursed for costs incurred as a consequence of compliance with state-mandated examinations as well as

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[48] 444 U.S. 646, 658 (1980).

attendance-reporting requirements. 444 U.S. at 658. Accusing the Court of a "long step backwards," 444 U.S. at 662, the *Regan* dissenters insisted that "the Court's holding today goes further in approving state assistance to sectarian schools than the Court had gone in past decisions." *Id.* at 666. The dissent understood clearly that the Court's refusal to follow *Wolman* was a rejection of "the finding of the Court in *Meek v. Pittenger* that *direct* aid to the educational function of religious schools necessarily advances the sectarian enterprise as a whole." *Id.* (emphasis in original).

Ensuing cases continued the movement away from the *Nyquist-Meek-Wolman* principle. In *Mueller v. Allen*, the Court allowed parents of private school children a state tax deduction for expenses incurred in providing tuition, textbooks and transportation. 463 U.S. 388 (1983). The Court understood clearly "that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." *Id.* at 399. Noting the availability of the deduction to all parents (including those whose children attend public or nonreligious private schools), the Court invoked the distinctive feature shared by the programs in *Everson* and *Board v. Allen*: both involved forms of "public assistance . . . made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." *Id.* at 399.

In the mid-1980's, the Court made it clearer still that its Establishment Clause decisions could not be explained in terms of a simple "no subsidy" principle. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court described the governmental practice of authorizing employees to take off work on religious holidays as a kind of religious subsidy. *Id.* at 676 ("it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance"). The following term, the Court

reiterated that it "ha[d] never accepted the mere possibility of subsidization . . . as sufficient to invalidate an aid program." *School Dist. v. Ball*, 473 U.S. 373, 394 (1985), *overruled in part by Agostini v. Felton*, 521 U.S. 203 (1997). And in *Witters v. Washington Department of Services for the Blind*, the Court allowed a tuition grant for attendance at a Bible college, not because it constituted no subsidy at all, but rather because it was what the majority called an "impermissible 'direct subsidy.'" 474 U.S. 481, 487 (1986).[49]

Bowen v. Kendrick continued the trend. 487 U.S. 589 (1988).[50] Although not a school-aid case *per se*,[51] *Bowen* noted that the Court had previously permitted both direct aid to religious institutions, *see* 487 U.S. at 608 (citing *Roemer, Everson, Allen, Tilton* and *Hunt*), and indirect aid to such institutions, *see id.* at 609 (citing *Witters, Mueller,*

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[49] Notwithstanding the *Witters* majority's reference to an "impermissible direct subsidy," even at that time direct subsidies to the educational function were not *per se* impermissible. *See, e.g., Regan*, 444 U.S. 646.

[50] In the term between *Witters* and *Bowen*, the Court rejected the no-subsidy notion in these words: "religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987).

[51] *Bowen* involved a federal statute (The Adolescent Family Life Act ("AFLA")) which authorized grants to a wide range of public and private agencies and organizations for teen-sexuality counseling. 487 U.S. at 593-97. The statute expressly permitted grants to religious organizations. *Id.* at 596. Indeed the statute "ma[de] it possible for religiously affiliated grantees to teach adolescents on issues that can be considered fundamental elements of religious doctrine." *Id.* at 598 (quotation omitted). However, the Court described the services provided by the statute as in themselves "not religious in character." *Id.* at 605. A substantial part of the "necessary services" to be provided under AFLA grants "involv[ed] some sort of education or counseling." *Id.*

Everson, and *Walz*).[52] Most importantly, the Court refused to assume that religiously-neutral educational services would be converted to constitutionally forbidden "religious activities" merely because they were carried out by religiously affiliated organizations. *Id.* at 612-13.[53] After *Bowen*, *direct* provision of state aid for educational purposes cannot be said to be prohibited merely because the recipient is religiously affiliated.[54]

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[52] In *Bowen* (as with Chapter 2 aid here) both public and private and religious and nonreligious entities were eligible for grants. *Id.* at 608. *Bowen* also noted that (as with Chapter 2 aid) the provision of the aid *directly* to the religious entity was not a disqualifier. *Id.* And it ruled out any *per se* prohibition on direct aid to so-called "pervasively sectarian" institutions, saying that, in the case of state aid to such entities, a court must analyze not only the question *whether* the institution is pervasively sectarian, but also "*to what extent* the statute directs government aid" to it. *Id.* at 610 (emphasis added).

The inquiry "to what extent the statute directs government aid" to a religious institution must be conducted in light of the principle that aid to religiously affiliated institutions is not impermissible merely because it flows to many recipients. *See* discussion at pp. 6-7 *supra* and supporting cases.

[53] Indeed, like the Chapter 2 aid at issue here, the government funds in *Bowen* were intended not to be spent for religious uses. *Id.* at 614-615 (discussing AFLA legislative history). But *unlike* the Chapter 2 aid at issue here, the statute in *Bowen* contained no express prohibition on the diversion of AFLA funds for religious use. In the Court's judgment, the absence of such a prohibition did not impermissibly advance religion. Here, by comparison, a plethora of statutory and regulatory rules and other administrative guidances, as well as reporting and equipment monitoring mechanisms, exist to ensure that Chapter 2 funds will not be diverted to religious uses.

[54] In 1989, the Court confronted the question whether a state tax-exemption for religious periodicals violated the Establishment Clause. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). The Court found a violation, but not because the Constitution forbade subsidies to religious organizations. Writing for the plurality, Justice Brennan assumed that some subsidies of religion would indeed be permissible, as when a "subsidy afforded [a] religious organization[] [is] warranted

The 1990's saw further erosion of the *Nyquist-Meek-Wolman* approach. In *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12 (1993), the Court approved a state-provided sign-language translator for a student attending a religiously affiliated high school. The dissent, attempting a revival of the *Nyquist-Meek-Wolman* principle, objected that "where the secular and the sectarian are 'inextricably intertwined,' governmental assistance to the educational function of the school necessarily entails governmental participation in the school's inculcation of religion." *Id.* at 19. The Court rejected *Nyquist-Meek-Wolman's* version of the no-subsidy rule in favor of the neutrality principle: "when the government offers a neutral service on the premises of sectarian school as part of a general program that 'is in no way skewed towards religion,' *Witters,* [474 U.S.] at 488, it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Zobrest*, 509 U.S. at 10.

Finally, the Court in *Agostini* flatly rejected the central principle underlying *Meek* and *Wolman*'s disapproval of state-provided educational materials: the notion "that any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination," 521 U.S. at 222, and therefore "is invalid." *Id.* at 225. And *Agostini* approved not only the generally available, remedial educational assistance of Title I, but also the very substantial, targeted aid provided in the Shared Time program at issue in *Ball*.

Thus, barring some excessive government entanglement, after *Agostini* only programs that finance religious indoctrination or that define beneficiaries by reference to religion may be said to advance religion impermissibly.

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by some overarching secular purpose that justifies like benefits for nonreligious groups." *Id.* at 14 n.4.

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This Court has always regarded neutral treatment of religious and nonreligious students alike as the centerpiece of its school-aid Establishment Clause jurisprudence. For a time in the 1970's, the Court struck down several school-aid measures on the premise that aid to the school as a whole impermissibly advances the school's religious mission. However, that notion is both inconsistent with subsequent cases and an impediment to evenhanded treatment of all eligible schoolchildren. The Court should reaffirm the principle of *Agostini* and lay to rest once and for all the notion that any aid to the educational function of religious schools is necessarily an impermissible advancement of the school's religious mission.

CONCLUSION

The "Establishment Clause should not be seen as foreclosing a practical response to the logistical difficulties of extending needed and desired aid to all the children of the community." *Wolman*, 433 U.S. at 247 n.14. Chapter 2 aid is just such a practical response. The instructional-materials prohibitions of *Meek* and *Wolman* should be overruled. The decision of the Fifth Circuit should be reversed.

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